L'Enfant Plaza Properties, Inc. and its Managing Agent Loews Corporation, d/b/a Loews L'Enfant Plaza Hotel *and* Carpenters District Council of Washington, D.C. and Vicinity, United Brotherhood of Carpenters and Joiners of America. Case 5–CA–20137

March 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

The issue presented here is whether the Respondent violated Section 8(a)(1) of the Act by prohibiting nonemployees from communicating the Union's area standards protest by distributing handbills to customers at the private property entrance to the Respondent's hotel.[1] Applying the analysis of nonemployee access issues set forth in *Jean Country*, 291 NLRB 11 (1988), the judge found that the Respondent acted unlawfully. While the case was before the Board on the Respondent's exceptions, the Supreme Court issued its decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), holding that the Board's balancing test in *Jean Country*, as applied to nonemployee union organizers, was inconsistent with controlling Court precedent.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. For the reasons fully set forth in *Leslie Homes, Inc.*, 316 NLRB 123 (1995), we hold that *Babcock & Wilcox*, 351 U.S. 105 (1956), as reaffirmed in *Lechmere*, applies to nonemployee area standards activities. Under those Supreme Court cases, a union organizer cannot ordinarily gain access to an employer's property for the purpose of organizing the employer's employees. The organizer can gain access only in the exceptional circumstance where the employees are reasonably accessible only through trespassory means. Applying that approach to the instant case, the General Counsel has failed to prove that the targets of the Union's handbilling, viz, the Respondent's customers, were reasonably accessible only through trespassory means. Accordingly, the Union was not entitled to access. We need not, and do not, reach the issue of whether access would be required if the customer targets of the handbilling were reasonably accessible only through trespassory means.

The Respondent owns and operates the Loews L'Enfant Plaza Hotel as part of a multi-building commercial complex in southwest Washington, D.C. The hotel stands at the east end of an open plaza. Office buildings are north and south of the plaza. L'Enfant Promenade, a broad divided public thoroughfare, borders the plaza on the west. A one-way service driveway provides vehicular access from L'Enfant Promenade to the hotel and adjacent office buildings. An estimated 95 percent of people using the hotel arrive by car, taxi, limousine, or bus. Most vehicles travel southbound on the Promenade, turn left, pause at a stop sign, then cross the northbound lanes to enter the service driveway. Northbound vehicles must slow considerably before turning right into the driveway. Some other vehicles travel from a lower level on a service drive adjacent to the northbound Promenade lanes, stop at a stop sign, then turn right onto the main service driveway. There are paved public areas adjacent to each of the aforementioned stop signs and immediately alongside the Promenade. The hotel, the plaza, the service driveways, and walkways next to the main driveway are on the Respondent's private property.

In the summer of 1988, three union representatives began area standards/customer boycott handbilling on the private property sidewalk directly in front of the hotel. ''PLEASE DO NOT PATRONIZE LOEW'S L'ENFANT PLAZA HOTEL'' headlined the handbills. In accompanying text, the Union asserted that nonunion employees of subcontractors performing renovation work at the hotel were receiving wages and benefits below the area standards.

The Union's representatives distributed an estimated 30 handbills in approximately 30 minutes. The Respondent's officials then informed the handbillers that they would have to move to the public property alongside L'Enfant Promenade. The handbillers complied with the request. Once on public property, they distributed approximately 470 handbills to pedestrians. One representative tried unsuccessfully to give handbills to the occupants of cars entering the driveway. After 45 minutes, the handbillers left. They did not return.

Applying the balancing test of *Jean Country*, the judge first assessed the strengths of the property rights and Section 7 rights involved in this case. He then considered the factor of reasonable alternative means of communication. The judge found that the Union's representatives faced no safety hazard and posed no significant risk of enmeshing neutrals by handbilling on public sidewalk areas. He concluded, however,

[1] On June 14, 1991, Administrative Law Judge David S. Davidson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] On February 13, 1992, the Board advised the parties that it would accept supplemental briefs discussing the impact of Lechmere on this case. On March 5, the General Counsel filed a motion to remand the case to the Regional Director for dismissal of the complaint. On May 1, the Board denied the General Counsel's motion. Thereafter, the General Counsel and the Respondent filed supplemental briefs. In addition, the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), the National Retail Federation, and the Council on Labor Law Equality filed briefs as amici curiae.

''that the General Counsel has shown that the effectiveness of the message that the Union sought to communicate to the hotel's patrons would be substantially diluted if the Union were to use the proposed alternative means of communication,'' viz, the public sidewalk.

In *Lechmere*, the Court held that *Jean Country* impermissibly recast as a ''multi-factor balancing test'' the general rule of *Babcock & Wilcox* permitting an employer to prohibit nonemployee distribution of union organizational literature on its property. 502 U.S. at 538. *Babcock*'s holding, as reaffirmed in *Lechmere*, is that Section 7 does not allow nonemployee union organizers to come onto private property except in the rare case where ''the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'' Id. Thus, ''it is only where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights.'' Id. (Emphasis in original.)

The General Counsel, the Respondent, the National Retail Federation, and the Council on Labor Law Equality contend that the Court's interpretation of *Babcock* in *Lechmere* applies to the nonemployees in this case who were seeking access to the Respondent's private property entrance to engage in area standards handbilling. The General Counsel argues, however, that the Respondent's denial of access to that location was unlawful even under the *Babcock/Lechmere* analysis because no reasonably effective alternatives existed for the Union to communicate its message to the public. The Respondent, the National Retail Federation, and the Council on Labor Law Equality contend that the General Counsel has failed to prove a lack of reasonable alternative means. The Union and amicus AFL–CIO argue that the *Babcock/Lechmere* analysis involved organizational activity and should not apply to protected area standards activity. They contend that more liberal access principles should govern where, as here, a union is acting on behalf of employees whom it already represents. Further, they argue, even if the *Babcock/Lechmere* analysis does apply, the Respondent violated the Act because the Union had no reasonable nontrespassory alternatives for communicating with the Respondent's customers.

In *Leslie*, supra, the Board considered the impact of *Lechmere* on nonemployee area standards activity. After reviewing *Lechmere* and related Court precedent,[3] the Board concluded that the Court intended the *Babcock* accommodation analysis to apply in nonorganizational settings. Accordingly, the general rule is that an employer may prohibit nonemployees from gaining access to its private property to engage in area standards activities. No balancing of employee and employer rights is appropriate unless the union can first demonstrate that it lacks reasonable access to the employer's customers outside the employer's property.[4]

We turn then to the question of whether the General Counsel has proven that the Union had no reasonable alternative means of communicating with the Respondent's customers.[5] In *Lechmere*, the Court stated that the *Babcock* exception requiring access to private property by nonemployee organizers applied only in rare situations where a union confronts ''unique obstacles'' to nontrespassory communications, as when the location of a plant and the living quarters of employees ''isolated [them] from the ordinary flow of information that characterizes our society.'' 502 U.S. at 539–541. The Court emphasized that the union's burden of proving the exception is a heavy one, which cannot be satisfied ''by mere conjecture or the expression of doubts concerning the effectiveness of non-trespassory means of communication.'' Id. at 540.

We find that the General Counsel has failed to prove that the Union was unable to communicate with the Respondent's customers by handbilling on public property adjacent to the Respondent's premises. The handbillers made only a token attempt of 45 minutes' duration to distribute their leaflets in this area. They were successful in communicating with pedestrians, but allegedly failed to persuade anyone in vehicles entering the hotel driveway to accept handbills. They did not make any attempt to handbill vehicles from areas adjacent to stop signs, where the occupants of stopped vehicles would presumably have a greater opportunity to accept the handbills. Absent such efforts, there is insufficient evidence to establish that the Union faced unique obstacles in communicating with the Respondent's customers by nontrespassory means.[6] Accordingly, we conclude that the Respondent did not violate

[3] *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 (1978).

[4] We therefore do not rely on the judge's assessment of the relative strengths of the property and Sec. 7 rights asserted by the parties.

[5] As in *Leslie*, we assume, without deciding, that the *Lechmere* analysis affords the possibility of an exception permitting access to private property for area standards activity if a union can prove that an employer's customers are not reasonably accessible by nontrespassory methods. Compare *Sears*, supra at 206 (''Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances.''); but cf. *John Ascuaga's Nugget v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (inaccessibility exception to the rule that an employer need not accommodate nonemployee organizers does not apply to attempts to communicate with the general public).

For a complete discussion of Member Cohen's position on the application of *Lechmere* to area standards activity, see *Leslie Homes*, supra at fn. 18.

[6] See, e.g., *Hutzler Brothers Co. v. NLRB*, 630 F.2d 1012, 1017–1018 (4th Cir. 1980).

Section 8(a)(1) of the Act by denying the Union access to handbill on private property at the entrance to the hotel. We shall therefore dismiss the complaint.

ORDER

The complaint is dismissed.

CHAIRMAN GOULD, concurring,

I join in the dismissal of the complaint in this case. See my additional comments set forth in my concurring opinion in *Leslie Homes*, 316 NLRB 123 (1995).

Bruce E. Goodman and *Joseph J. Baniszewski, Esqs.*, for the General Counsel.
Peter Chatilowicz, Esq. (Seyfarth, Shaw, Fairweather & Geraldson), of Washington, D.C., for the Respondents.
Joseph P. Stanalonis, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge. This case was tried in Washington, D.C., on July 18, 1990. The charge was filed on December 1, 1988,[1] and the complaint was issued on July 28, 1989, and thereafter amended.

The issue in this case is whether Respondents violated Section 8(a)(1) of the National Labor Relations Act by prohibiting distribution of handbills by representatives of the Charging Party (Union) at or near the main entrance to Respondents' hotel.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent L'Enfant Plaza Properties, Inc. (L'Enfant) owns and Respondent Loews Corporation (Loews) operates the Loews L'Enfant Plaza Hotel in Washington, D.C. In the course of the operation of the hotel Respondents annually derive gross revenues in excess of $500,000, and purchase and receive at the hotel goods and services valued in excess of $10,000 directly from points located outside the District of Columbia. Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Hotel and Its Environs*

The hotel is located in a building complex in Southwest Washington known as L'Enfant Plaza. Respondent Loews operates the hotel for Respondent L'Enfant pursuant to a management agreement. The complex includes four buildings surrounding an open plaza. Beneath the plaza and the buildings is a retail shopping mall. L'Enfant owns the east building in which the hotel is located, the north building, the open plaza area between the north and south buildings, building line to building line, and the retail stores and parking garage beneath the plaza and the north and east buildings.[3] The west building is separated from the remainder of the complex by a broad public thoroughfare known as L'Enfant Promenade. From the Promenade vehicular traffic can reach the plaza level entrances to the south, east, and north buildings by means of a one-way service drive which passes in front of them. There are also walkways next to the drive on which pedestrians may walk from the Promenade to entrances to the three buildings. The service drive and the walkways are all on property owned by L'Enfant. The boundary between the public thoroughfare and the property owned by L'Enfant is marked by an expansion joint.

The hotel occupies the plaza level, half of the second floor, half of the service level, and the top four floors of the east building. The promenade level is occupied by retail stores, and the remainder of the 12-story building is occupied by offices. The main entrance to the hotel is located on the plaza level facing the service drive. About 40 feet away there is a second entrance to the building for the offices through which the hotel can also be reached. The expansion joint which marks the boundary of L'Enfant's property is approximately 250 feet from the main entrance to the hotel.[4]

B. *The Union's Dispute*

In the summer and early fall of 1988 L'Enfant contracted with Doyle Construction, Inc. (Doyle) to renovate the interior and exterior of the hotel. Doyle performed the work with some of its own employees and with subcontractors. In October, Joseph Stanalonis, an organizer for the Union, learned of the renovation project and visited the hotel. Stanalonis questioned two employees working on the project and concluded that the carpenters employed by Doyle on the jobsite

[1] All dates are in 1988 unless otherwise indicated.

[2] Respondents by letter filed a reply to one aspect of the General Counsel's brief, and counsel for the General Counsel was given leave to file a reply brief which has been received. At the hearing witnesses marked locations on a diagram of the property which was received in evidence as Jt. Exh. 1. The copy so marked was lost in transmission from the court reporter. The parties have stipulated to its replacement by a copy of the diagram on which some of the markings (B through F) have been reproduced.

[3] Addison Johnson, property manager for L'Enfant, so testified. The General Counsel contends that Respondents failed to prove that L'Enfant owns the property because the preamble to the management agreement between L'Enfant and Loews states that L'Enfant is the lessee of the land and L'Enfant failed to put the lease in evidence to establish its property interest. The management agreement is dated May 27, 1971, and the latest amendment to it in evidence is dated September 25, 1975. There is no inconsistency between these documents, which establish the relationship between L'Enfant and Loews, and the testimony of Johnson as to the ownership of the property as of the time of the events at issue. I have credited the uncontradicted testimony of Johnson.

[4] There is some confusion in the record as to the exact distance. As the parties stipulated that the scale of the diagram of the property received in evidence is 60 feet to the inch, however, I find that the distance between the entrance and the nearest point on the expansion joint is approximately 250 feet.

were nonunion and were receiving less than the area standard for carpenters' work.

Thereafter, the Union's secretary-treasurer wrote Doyle complaining that Doyle's carpenters were being paid below the minimum rate set in the Union's area standard agreement and threatening that if the Union was not advised that the information it had received was incorrect, he would inform the community-at-large that Doyle did not honor area standard wages and fringe benefits. Doyle did not reply to the letter. At some point during the latter part of October Stanalonis telephoned the L'Enfant office and spoke about the matter to a representative who told him that the owner had picked its contractor and that if the Union had a problem he should take it up with the contractor.

C. *The Handbilling*

On November 21 Stanalonis went to the hotel accompanied by Union Representatives Robert Swann and Terry Milstead. About 11:30 a.m. they started to pass out handbills in front of the hotel. Swann and Milstead stood approximately 20 feet from the main entrance to the hotel near the curb. Stanalonis stood between the main entrance and the entrance the office portion of the building.

The handbills were captioned, ''PLEASE DO NOT PATRONIZE LOEW'S L'ENFANT PLAZA HOTEL,'' and contained several paragraphs of text. In the first paragraph the Union set forth its understanding that Loews had chosen contractors to renovate the hotel who were paying wages and benefits below the area standard. In the next paragraph the Union asserted that it could not maintain or improve its standards if there were employees in the industry who were paid a lower wage and that the payment of lower wages had a negative impact on the carpenters and the community as a whole. After stating that the hotel was not cutting its prices, the Union asked for the support of the public, and the leaflet concluded with a disclaimer that the handbill was intended to organize employees, gain recognition for the Union, cause a work stoppage, or cause anyone to cease doing business with any other person.

After the handbilling began, an employee of the hotel came out to get a copy of the handbill which he took back into the hotel with him. Shortly thereafter Robert Patterson, director of security for L'Enfant,[5] and Thomas Negri, a management representative of Loews, came out of the hotel and advised the union representatives that they had to leave the premises. Patterson told Stanalonis that if they wanted to continue to handbill, they would have to go to public property at the expansion joint. The union representatives complied with the request and went to the expansion joint to continue handbilling.

During the handbilling at the hotel entrances, which lasted for about 30 minutes, the union representatives handed out approximately 30 handbills. They did not block any entrance and positioned themselves so that they would not interrupt the flow of people in and out of the hotel. They did not cause any employee to stop work. All those to whom they gave handbills appeared to be going to the hotel. None of the handbills were thrown on the ground.

After the representatives moved to the expansion joint, they distributed approximately 470 handbills over a period of about 45 minutes after which they left. Stanalonis and Milstead stood at the sidewalk which leads to the entrances to the north and east buildings, the hotel, and the open plaza area. The sidewalk is also next to the roadway used by cars exiting the service drive after passing by the building entrances. They handed out leaflets to persons walking in the direction of the hotel. Most of those to whom they handed handbills appeared to go to an open set of stairs in the Plaza area which leads to the shopping mall. Stanalonis did not see anyone to whom he handed a handbill walk as far as the hotel and enter it. Swann stood at the entrance to the service drive and tried to hand leaflets to cars entering the drive. No one stopped to take a leaflet from him. After 45 minutes the union representatives left the area and did not return again.

D. *Concluding Findings*

In *Fairmont Hotel*, 282 NLRB 139, 142 (1986), the Board propounded a test for balancing the right to engage in activity protected by Section 7 of the Act against a property owner's right to keep out those whom he has not invited to enter.

> [I]t is the Board's task first to weigh the relative strength of each party's claim. If the property owner's claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative.

In *Jean Country*, the Board reconsidered the role of alternative means in weighing competing claims of Section 7 rights and property rights and concluded ''that the availability of reasonable alternative means is a factor that must be considered in every access case.'' 291 NLRB 11 (1988). After enumerating factors that may be relevant in assessing the weight of the rights invoked and the availability of alternative means, the Board concluded:

> [I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. In the final analysis, however, there is no simple formula that will immediately determine the result in every case. As the Court made clear in *Hudgens*, we are trying to accommodate interests along a spectrum. Inevitably, as we apply our analysis in future cases some patterns will become more clear. For example, denial of access will more likely be found unlawful when property is open to the general public than when a more private character has been maintained. But, as with other legal questions involving multiple factors, the ''nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational

[5] Patterson is employed by a private security company which has a contract with L'Enfant to provide for security in all of the areas owned by L'Enfant, including the Hotel.

response, not a quick, definitive formula as a comprehensive answer.'' [Id. at 14.]

The General Counsel contends that the threshold issue to be decided is whether the party which attempted to limit access had genuine interests in the property. Here both Loews and L'Enfant sought to and did limit the access of the Union to the entrance to the hotel. Although the General Counsel contends that neither met the burden of proving that it had interests in the property in front of the hotel building, I have found above that L'Enfant was its owner. Pursuant to the management agreement, Loews was the exclusive operator of the hotel. As such, Loews was L'Enfant's agent for purposes of operating the hotel. Thus, L'Enfant has an owner's interest in the hotel business which Loews operates and in the entire property. To the extent that Loews acted in conjunction with L'Enfant concerning the sidewalk in front of the hotel, its conduct was also based on a legitimate interest in the property.[6]

In *Jean Country*, the Board stated that it would consider the following factors, among others, in weighing property rights: ''the use to which the property is put, the restrictions, if any, that are imposed on public access to the property, and the property's relative size and openness.'' Id. at 13.

Here the area in front of the main entrance where Swann and Milstead stood while passing out handbills is used in much the same fashion as that in *Fairmont*, supra. It is a covered area where those guests and other patrons arrive at and leave the hotel and where their baggage is loaded and unloaded. It was estimated that 95 percent of the hotel guests arrive and leave by car, taxi, or other vehicle and use the main entrance. The covered area is approximately 35 feet wide and 20-feet deep. It is a busy area during the morning and through lunch as hotel guests check out of the hotel up to the 1 p.m. deadline. At busy times the area can become congested with people and luggage. In the past there have been thefts of luggage and cars temporarily left in front of the main entrance, and there is usually at least one guard posted in the general area. The area in front of the main entrance can also be used by persons walking by the hotel, and L'Enfant does not try to restrict its use to hotel guests, but it does try to keep persons from loitering in that area. Neither of the plaza entrances to the east building is used by the hotel's employees or suppliers who are required to use designated entrances on a lower level.

The area where Stanalonis stood was between the two entrances to the building and could have been used by anyone walking between those entrances or between buildings as well as by hotel guests.

L'Enfant maintains and enforces a no-solicitation policy which bars charitable, religious, commercial, and other organizations from soliciting on its premises. Pursuant to its policy, L'Enfant has precluded handbilling and solicitation on numerous occasions. Apart from those restrictions, however, the general public is invited to patronize the hotel, its restaurants, and other businesses located within the L'Enfant Plaza complex. There is a sign near the entrance to the service drive which reads, ''ENTERING PRIVATE PROPERTY—PARKING STRICTLY ENFORCED.'' There is no sign on the plaza level to indicate that access is limited or that distributions are not permitted.

As in *Fairmont*, supra, Respondents had a valid interest in the property and in limiting congestion, litter, and the possibility of theft of luggage in the area in front of the hotel entrance. The presence of outsiders distributing handbills in the area would tend to disturb guests entering or leaving the hotel and to disturb the hotel's decorum. Unlike *Fairmont*, however, the area in front of the entrance was not restricted to hotel guests or those otherwise having business in the hotel. The property rights of the hotel in this case are strong but tempered by the quasi-public use of the sidewalk which leave Respondents' property rights weaker than those in *Fairmont*. If access to the property were granted, the degree of impairment of the private property right would have been limited, due to the quasi-public use of the sidewalk, the number of union representatives who distributed the handbills, the locations at which they stood, and the absence of any litter or interference with the normal flow of traffic at the entrance.

Turning to the Section 7 rights being asserted, in *Jean Country*, supra at 13, the Board set forth the following factors, among others, to be considered: ''the nature of the right, the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute), the relationship of the employer or other target to the property to which access is sought, the identity of the audience to which the communications concerning the Section 7 right are directed, and the manner in which the activity related to that right is carried out.''

Here, the Section 7 right being asserted was the right to inform the public that the carpenters employed by Doyle in renovating the hotel were being paid wages and benefits below the area standards established by the Union's collective-bargaining agreements. Doyle, with whom the Union had its primary dispute was employed as a contractor on the hotel premises at the time of the handbilling.[7] The communications were directed at those patronizing or about to patronize the hotel, and the handbilling was carried out in an orderly manner by three individuals only two of whom were standing in the covered area immediately in front of the main entrance. The three individuals did not block any entrances to the hotel, did not interrupt the flow of people in and out of the hotel, and did not cause any employees to stop work.

While area standards activity is a protected exercise of Section 7 rights, it is protected to a lesser extent than ''activity that furthers a 'core' purpose of the Act.'' *Red Food Stores*, 296 NLRB 450, 453 (1989). Here the handbilling took place during the time period that employees of the primary employer were engaged in renovation work at the hotel, giving greater connection between the Respondents and the activity than was present in *Fairmont*, supra, and ''although not on the strong end of the spectrum of Section 7 rights, [the Union's Section 7] right is also worthy of protection against substantial impairment.'' *Best Co.*, 293 NLRB 845, 847 (1989).

[6] *Jean Country*, supra at 16. There is testimony that the area in front of the entrance was under the exclusive control of the Loews, but the evidence otherwise indicates that it was under the control of L'Enfant or the joint control of L'Enfant and Loews. In any case I find no difference in their interests.

[7] There is no evidence to indicate whether carpenters employed by Doyle were on the premises on the day of the handbilling.

In determining and weighing the degree of impairment of the Section 7 right if access were to be denied, it is necessary to consider whether the Union had reasonable alternative means to communicate its message. In *Jean Country*, supra at 13, the Board set forth the following factors to be considered among others: ''the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and, most significantly, the extent to which exclusive use of the nontrepassory alternatives would dilute the effectiveness of the message.''

It is the General Counsel who ''must show that without access to the property, those seeking to exercise the right in question have no reasonable means of communication with the audience that exercise of that right entails. . . . What is required is simply a clear showing, based on objective considerations, rather than subjective impressions, that reasonably effective alternative means were unavailable in the circumstances.'' *Jean Country*, supra at 12.

The General Counsel contends that the only means available for the Union to communicate its message effectively to the patrons of the hotel was to distribute its handbills at the main entrance. To support this contention the General Counsel points to the fact that at the main entrance the three union representatives distributed approximately 30 handbills to individuals clearly identifiable as patrons or potential patrons of the hotel, while during the period of time that they stood on public property they distributed approximately 470 handbills to persons who may or may not have intended to patronize the hotel, substantially diluting the Union's message.

Respondents do not contend that the handbilling on public property as conducted by the union representatives was a reasonable alternative, but they contend there were other reasonable alternatives. Specifically, Respondents contend that handbilling and the display of signs at two points which all cars entering the service drive must pass constituted reasonable alternative means of communicating with the hotel's patrons.

Most, perhaps as many as 95 percent, of those coming to the hotel arrive by car, taxi, limousine, or other vehicle. Most of the vehicles coming to the hotel come south on L'Enfant Promenade and make a left turn into the service drive. The north and south bound lanes of L'Enfant Promenade are separated by a broad median strip. There is an opening in the median strip at the place where cars make the left turn, and there is a stop sign on the adjacent median strip where cars enter the north bound lanes to cross them. Thus, all cars turning left must stop before crossing the north bound lanes. Respondents contend that the Union could effectively communicate its message to those approaching the hotel from the north by displaying signs and handbilling at the stop sign.

The remaining vehicles going to the hotel approach either from the northbound lanes of L'Enfant Promenade or from a ramp which comes from a lower level and ends at the entrance to the service drive. There is a small paved island on public property between the ramp and the northbound lanes of L'Enfant Promenade at the entrance to the service drive. There is a stop sign at the end of the ramp, and cars coming up the ramp must stop before turning into the drive. For those making a right turn from L'Enfant Promenade there is no stop sign. Respondents contend that the paved area adjacent to the stop sign at the end of the ramp is the other location where the Union could effectively communicate its message to those approaching from the south.

Posting persons with signs and handbills at the locations suggested by Respondents would not place them in any physical danger and would not place any undue burden or expense upon the Union. Moreover, the risk of enmeshing neutrals in the dispute appears to be limited. Employees and suppliers of the hotel do not use the service drive or the plaza level to enter the building. Many of the employees who work in the office portion of the east building and in the north and south buildings arrive by public transportation or by car. They park in the garage levels and go to their offices without passing the proposed location of those with signs and handbills. Insofar as the record shows, the only others who would pass the proposed locations on their way to the three buildings which front on the service drive are visitors to the offices, employees in the offices who might be dropped off at the building entrances or arrive on foot, and possibly some pedestrians going to the stairs which go down to the shopping mall located in the plaza area. While those arriving by vehicle might be exposed only to the signs and miss the identity of the target of the protest, those arriving on foot would be more likely both to read the sign completely and to take and read the handbills if concerned about the purpose of the signs. Although there is the possibility of enmeshing neutrals through the impact of the signs on those arriving at the office buildings by car, based on the record it cannot be said that the General Counsel has shown that there would be any substantial enmeshment of neutrals if this alternative means of communication were used.

Most significant in the Board's *Jean Country* analysis is the extent to which the exclusive use of the alternative means of communication would dilute the effectiveness of the Union's message. As noted by the Board in other cases, the Union's message could not be conveyed in its entirety on signs and would be necessarily reduced to a bare outline.[8] Although handbills can carry the entire message, it is unlikely that all those coming to the hotel in private cars would stop long enough to open a car window and take a handbill, and those arriving by taxi, limousine, or bus would be even less likely to receive them.[9] Therefore, I conclude that the General Counsel has shown that the effectiveness of the mes-

[8] *Tecumseh Foodland*, 294 NLRB 486 (1989); *Sentry Markets*, 296 NLRB 40 (1989); *Sparks Nugget*, 298 NLRB 524 (1990). Compare *Red Food Stores*, 296 NLRB 450 (1989), wherein the Board found that the union had an available reasonable alternative when it picketed and handbilled on public property at the perimeters of the stores and advertised its dispute with the primary employer through the media.

[9] *Sentry Markets*, supra; *Sparks Nugget*, supra. In his testimony Stanalonis questioned whether those arriving at the hotel would notice or pay attention to signs placed so far from the actual entrance to the hotel and expressed doubt that people who saw them would stop to read them, asserting that in Washington there were so many demonstrations that people ignore signs. Stanalonis also testified that it was more effective to give people a leaflet that they could take with them and read when they reached their destinations. While Stanalonis' experience as a union representative may lend some authority to his observation as to the relative effectiveness of signs and handbills, his testimony about how or why others react to signs in Washington seems highly subjective and not entitled to any special weight.

sage that the Union sought to communicate to the hotel's patrons would be substantially diluted if the Union were to use the proposed alternative means of communication.[10]

[10] Respondents contend that the audience at which the Union's protest was directed was the public at large, as indicated in the Union's letter to Doyle, and that another reasonable alternative for the Union was to handbill and/or picket at Doyle's premises and other premises where Doyle was working. When the primary employer is presently working at the secondary employer's premises, however, the Board has not required the General Counsel to show that a union is unable to communicate its protest against a primary employer at other locations. Compare *Best Co.*, 293 NLRB 845 (1989), with *Federated Department Stores*, 294 NLRB 650 (1989); *Hardee's Food Systems*, 294 NLRB 642 (1989); and *Homart Development Co.*, 286 NLRB 714 (1987). As Doyle was engaged in renovation work at Respondents' premises at the time that the Union sought access, I find that General Counsel's burden of proof did not require a showing that the Union was unable to communicate its protest to the public at locations other than the hotel. While the Union's purpose generally may have been to communicate with the public at large, the patrons of the hotel were a distinct segment of the public patronizing a facility at which Doyle was working. Handbilling or picketing elsewhere would not reach this segment. If Doyle were through with its work at the hotel or had merely worked for Respondents at locations other than the hotel, the patrons of the hotel would have no greater relation to the work being performed by Doyle than the members of the public who could be reached at other locations, and the ability to communicate with the public at other locations would become determinative.

Although I have found above that the Respondents property rights are relatively strong, I have also found that they were tempered by the quasi-public nature of the use of the sidewalk in front of Respondent's main entrance and that the impairment of Respondent's property rights was not substantial given the fact that interference with Respondents' business activity at the main entrance was minimal. Conversely, I have found that although the Union's Section 7 rights were not core rights and were relatively weak, if the Union were denied the right to handbill in front of the main evidence and required to move its protest to public property, its message would be substantially diluted and therefore the Union's Section 7 rights would be impaired. Accordingly, I find that by requiring the union representatives to leave Respondents' property, Respondents violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By ordering Union Representatives Stanalonis, Milstead, and Swann to leave their property in front of the Loews L'Enfant Plaza Hotel, Respondents interfered with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

[Recommended Order omitted from publication.]